IN THE

United States

Circuit Court of Appeals

FOR THE NINTH DISTRICT

J. M. DUNGAN and EUNICE DUNGAN, his wife,
Appellants,
vs.
POTLATCH LUMBER COMPANY, a Corporation,
Appellee.
No. 6166

PETITION FOR A REHEARING

On Appeal from the United States District Court for the Eastern District of Washington, Northern Division

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and
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Appellants hereby petitioning for a reconsideration of the opinion filed on October 6, 1930, and for a rehearing of the above cause, beg most respectfully to show as grounds therefor:

I

Though we would much prefer to avoid what is conceived to be our duty of most respectfully calling attention thereto, there can be no escape from the plain fact that the statement in the opinion that

> "appellant agreed to cut and deliver *in the form of logs* at points to be designated by the appellee all the white pine timber standing on the land they then owned, etc.,"

is altogether erroneous.

Emphasizing this misconception, the opinion further erroneously states,

> "It (appellee) could not reject the excess of each log or small delivery; that would have been impracticable. Nor at the end of the month's deliveries was it feasible to reject the excess; it (appellee) had received logs and manufactured them into lumber."

The contract specifically provides for the delivery, not of logs, but of lumber manufactured pursuant to the specifications attached thereto. The record uncon-

trovertedly shows, furthermore, that all deliveries were of lumber and in no instance of logs.

It is now realized that the opening paragraphs of the contract (Rec. p. 6), standing alone, might lend some justification to the construction placed thereon by the court, but it quickly appears on further reading that appellants were required, as it actually did, to deliver, not logs, but manufactured lumber. Thus, further to quote the contract (Rec. p. 8),

> "Said purchase price shall be paid for such lumber hereinbefore specified upon delivery and loading on lumber trucks of party of the second part, as aforesaid, and subject to the conditions herein contained, as follows: Second party shall pay Thirty-one and 50/100 ($31.50) per thousand feet, board measure, for such lumber as shall have been delivered during the preceding calendar month, as herein specified, according to the scale bill rendered by the scaler or grader as herein provided, such payment of Thirty-one and 50/100 Dollars ($31.50) per thousand feet, board measure, to be made monthly on or before the eighth day of the calendar month following delivery."

Also, as showing a misconception of the contract, the opinion incorrectly states that $1.00 per thousand was to be withheld from the purchase price for deliveries made

> "upon final settlement and upon satisfactory proof that appellant had discharged all claims which

> might constitute *liens upon the logs* and had complied with laws and regulations touching fire hazards and other conditions particularly specified in the contract."

The language of the contract, on the other hand (Rec. p. 9), is that

> "second party (appellee) shall withhold from any sum or sums due from final payment to first parties under this contract the sum of One Dollar ($1.00) per thousand feet for all While Pine Lumber covered by and cut, manufactured, hauled and delivered under the terms and provisions of this contract,"

pending proof of compliance with the laws and regulations touching fire hazards, etc.

Still further on (Rec. pp. 12, 13), the contract provides

> "Second party (appellee) agrees to furnish a grader or scaler, at its own cost and expense. Said grader or scaler shall inspect and grade all lumber covered by this contract,"

and again,

> "First parties (appellants) further agree to remove from the lumber yard of the party of the second part, at their own cost and expense, and within a reasonable time, not exceeding seven days from date of rejection by grader, all lumber which is not up to grade or in accordance with the specifications as herein specified and is, therefore, rejected by the second party. *Rejection shall*

be deemed automatically made by second party at time of grading."

The errors in the court's construction of the contract, to which attention is called, are not merely of form but of substance.

Erroneously considering the contract as providing for the delivery of logs instead of lumber, the opinion, as a ground for the construction of the contract adopted by the court, states

> "It (appellee) could not reject the excess of each log or small delivery; that would have been impracticable. Nor at the end of the months' delivery was it feasible to reject the excess; it (appellee) had received logs and manufactured them into lumber."

Obviously, the objections advanced with respect to logs (logs not being involved) could have no application to the deliveries of lumber required and made under the terms of the contract.

The contract was prepared by appellee (Rec. p. 49). Hence in case of uncertainty it must be construed most favorably to appellants, and it is elementary, of course, that its true meaning must be determined from the consideration of the entire instrument, from which it follows that each and all of the above paragraphs must be considered together and not separately. The

contract provides for rejection by appellee's grader of

> "all lumber which is not up to grade or in accordance with the specifications"

attached to the contract. It further provides for payment on or before the eighth day of each calendar month

> "for such lumber as shall have been delivered during the preceding calendar month"

according to the scale rendered by appellee's scaler or grader.

The provisions of the contract just noted are in no wise mentioned in the recent opinion nor does the opinion state any reason *why* it was not feasible to reject the excess; i. e., the excess at the end of the months' deliveries of No. 3 grade lumber, pursuant to the terms of the contract. The contract expressly provides for monthly settlements in accordance with the scale bill of appellee's grader. It further provides for automatic rejection of all lumber not up to grade. Hence, as said at the bottom of page 32 of appellants' brief, on this appeal

> "The contract must be construed as *severable,* month by month, with respect to the deliveries for which appellee, on acceptance after inspection, was required to make payment."

This contention goes to the very gist and essence of the case and appellants respectfully submit that a misapprehension of the facts of the case upon this point has led the Court into error in its judgment and affords a just ground for a rehearing and reargument.

Certainly the parties, both of whom were fully aware of their rights, fully competent to contract in regard to the business in hand (appellee, a large operator, being especially familiar with the various phases of the lumber business involved in the transaction), had a right to make such a contract. They did make it and it cannot be said that rejection, on monthly settlements, of any excess of No. 3 Common lumber thereby required, was unconscionable, unreasonable or invalid in any sense. We respectfully submit, therefore, that it was not only "feasible" and not "impracticable" to comply with the provision for monthly settlements, but it was complied with during a period of more than two years, and up to the last month, at the conclusion of deliveries. That these monthly settlements should in all fairness be held final and conclusive appears, not only from the circumstances that up to the last month they were made without reservation, but also from the surrounding conditions disclosed by the record and by a careful con-

sideration of the nature of the transaction.

In suggesting that a monthly settlement was not feasible or practicable, the court evidently overlooked the provision in the contract that the rejected lumber, if any, should be hauled away by appellant, within seven days after rejection.

Even if there were difficulties in settling the transaction in the manner provided by the contract, that is, by monthly settlements, such as those suggested by the court, these difficulties were inherent in the contract and were of the appellee's own making. We think we have demonstrated, however, that as a matter of fact, there were no such difficulties; and that such as are suggested are wholly imaginary and that a monthly settlement, as provided by the contract, was not only feasible and practicable but was by far the simplest and easiest, as well as, the justest manner in which the questions at issue could have been determined.

As the lumber company (appellee) had the advantage of doing the grading and its own report was final and conclusive, appellants should not only be given the full advantage of all doubtful provisions as drawn, but the contract as a whole should be construed strictly in their favor.

The importance of our ~~own~~ contention that there could be no correct interpretation of the contract under the misconception of its provisions, evidenced by the recent opinion, yields to demonstration. Had the deliveries been of logs instead of lumber there would not have existed, for appellants, the opportunity for improving the grades which would have been afforded by notice to appellants that the lumber delivered was not up to specifications. Had appellants been notified of the claimed inferiority of the lumber delivered, they could have immediately taken steps to remedy the defects and avoided the claimed excess of No. 3 Common. Such notice would also have enabled them to check up on the grades and thus they would have been in position to determine, on their own account, whether they were getting a fair deal, an honest deal, at the hands of the purchaser of the lumber, and to have taken such steps as might have been deemed necessary for their own protection in the event of unfairness or dishonesty, any provision of the contract to the contrary notwithstanding. It is elementary that no contract, however stringent its terms, can be used as a vehicle for the promotion of dishonesty nor be allowed to stand as a shield for the protection of fraud.

Appellants' claim of waiver and estoppel is bottomed

on this lack of notice and their consequent omission to collect evidence and take such other steps as might have appeared necessary for their own protection.

The opinion of the court suggests that if lumber had been rejected on each months' delivery, Dungan would have protested that such rejection was not to be made until the whole amount had been delivered. We are not able to perceive by what course of reasoning the court arrives at this conclusion or assumption. There is no circumstance whatever upon which to conclude that Dungan would have made any such protest and it is unreasonable to assume that he would have done so in the face of the express provisions of the contract. Dungan would have had no right to make any such protest, since the contract expressly provides for grading, monthly or earlier removal of all rejected lumber, and monthly payment for the deliveries of the preceding month.

As to the objection set forth, both in the opinion of the lower court and of this court, that a monthly settlement could not be made because it was impossible to say whether there was more than 25% of No. 3 Common lumber out of the whole amount to be delivered until the whole lot had been delivered, we respectfully submit that the method stipulated by the contract was entirely practicable. Had rejections been

made in connection with the monthly settlements, Dungan would have had current notice of his status in the matter and could have regulated his future deliveries accordingly. There would have been no such insuperable difficulty, as suggested but not designated by the court.

There would have been no differences to settle if the rejections had been made each month. There could not have remained at the end of the transaction a surplus of No. 3 Common lumber (that is, more than 25% of the whole),—as the rejections would have been made each month of any excess of No. 3 over 25% of the whole delivered up to the time of each settlement. All that would then have remained to do would have been to settle for the last month's deliveries according to the terms of the contract.

Having provided in the contract that the lumber company should pay each month for the lumber graded and accepted during the preceding month, and that Dungan was to remove within seven days all rejected lumber, and these settlements having been made as stipulated each month up to the completion of the contract, without a single rejection and without notification to appellant to remove any lumber, we submit in all sincerity and earnestness that appellee is now *estopped* from reopening these settlements.

II

The recent opinion recites, as though an undisputed fact, that on completion of the operation it was found that there were 780,851 feet of No. 3 Common in excess of the 25% permitted by the contract. The record shows, on the other hand, that Special Finding of Fact No. 5 (Rec. p. 36), indicating that amount of No. 3 Common in excess of 25% of the total cut and delivery of lumber, was excepted to below (Rec. p. 37) and assigned as error in perfecting the appeal (Assignment of Error No. 10, Rec. p. 71), and that the objection to said finding is carried into the record as Specification of Error No. 10, on page 16 of appellants' brief.

Moreover, it was specifically pointed out in the oral argument that Special Finding No. 4 fixing 25% of the total delivery at 1,519,112 ft. is a plain error in computation. The correct quotient of 6,857,307, the total delivery, divided by 4 is 1,714,326 ft., making a difference in appellants' favor in the amount of No. 3 Common that appellees were required to take within the 25% limit of 585,647 ft., upon which basis appellants are entitled to a judgment of more than $3,000 in excess of that which they were awarded at the trial.

Surely this is a matter of sufficient importance to be worthy of consideration, and of itself justly calls for a rehearing.

Respectfully submitted,

O. C. MOORE,
and
BRUCE BLAKE,
Attorneys for Appellants and Petitioners.

CERTIFICATE OF COUNSEL

We, the undersigned, counsel and attorneys for appellants and petitioners in the above entitled cause, hereby certify, each for himself and not one for the other, that in our judgment the foregoing petition for a rehearing is well founded and that it is not interposed for delay.

O. C. MOORE,
BRUCE BLAKE.